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of placing their property in the hands of defendant, for the purpose of completing the road to La Crosse, of paying the annual interest of liens, and of satisfying his claim.

Although this court pronounced the arrangement fraudulent and void as to creditors, yet it was valid between the parties, and this suit can be defended under it. The deed to defendant is not a conveyance of the property. The rolling stock was the property of the company in defendant's hands. It might as well be claimed that the receiver appointed by this court should account for the use of the patented improvement, which, I presume, will not be pretended. The receiver holds the property of the company for the benefit of its creditors. Defendant did so with consent of the company, for the same purpose. In both cases, the company is the owner of the cars with the patented improvement attached. The company did not divest itself, by its deed to defendant, of its corporate entity or property.

Defendant is to be viewed in the light of an agent and trustee. He was a mere substitute for the company, and his use of the cars was the same as that of the company, and exclusive as to third persons or other interests in the meaning of the license.

The bill will be dismissed.

In the Supreme Court of Connecticut.—October Term, 1861.¹

THE BRIDGEPORT BANK vs. THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.

R. & G. L. Schuyler being the owners of one hundred and sixty shares in the defendant's company, of which R. Schuyler was the Register and Transfer Agent, the latter in 1849 delivered to the plaintiffs, as collateral security for a debt due by him, certificates for ninety of those shares, with a blank power. No

¹ We are indebted to the kindness of Mr. Justice Ellsworth for this important and valuable opinion, for which we desire to express our grateful acknowledgments. We hope, at some future time, to discuss the questions involved, and others germane to them, more in detail than our present leisure or space will allow.—*Eds. Am. Law Reg.*

application for a transfer on the books of the company, as required by the charter, was made until 1854, when it was discovered that R. S. had been guilty of a fraudulent over issue of the stock of the company to his firm, but there was no evidence that any of this spurious stock had passed out of the hands of the firm before the delivery of the genuine certificates to the plaintiffs. The company subsequently refused to allow the transfer of the latter. *Held*,

1. *Burden of proof*.—It is incumbent upon the defendants to show, if such be the fact, that these certificates do not represent the genuine stock of the company, that being a fact more exclusively in their power to prove.
2. *Plaintiffs' title*.—The plaintiffs are to be regarded as the first and only equitable purchasers and owners of ninety of the one hundred and sixty shares of genuine stock held by Schuyler.
3. *Plaintiffs' title not lost by delay*.—The *bona fide* holders of such certificates had a right to rely upon them, as securing to the owners the shares which they represented, against all transfer to other parties.
4. *Notice to the Company*.—The *knowledge* of Schuyler that these certificates were held by *bona fide* purchasers, for value, was notice to the company, while he acted as their transfer agent in registering the transfers to subsequent parties, and thus affected them, constructively, with the fraud of their agent, and thereby avoided the effect of such transfers as between the plaintiffs and the company, and rendered them liable to make good the plaintiffs' loss thereby sustained.
5. *Semble*.—It is by no means certain that the transfers registered are to be regarded as having operated upon the plaintiffs' shares.
6. *Blank transfers*.—Blank powers of attorney, for transferring stock, although under seal, may be filled up at the convenience of the transferee, and thus operate as of their date.
7. *Lex loci*.—Such being the settled law of the State of New York where this instrument was intended to take effect, will remove all question as to its validity, even if we admit that the law of the place where it was executed is otherwise.

The plaintiffs, in 1849, took from Robert Schuyler two certificates of stock in the defendants' company, one for fifty and the other for forty shares, as collateral security for the balance due on account against him. The bank held these certificates, without transfers, until 1854, when the Schuyler frauds were discovered. They then demanded of the company a transfer of the shares, which was refused, and this suit was brought. At the time the bank took these certificates, Schuyler owned one hundred and sixty shares of the genuine stock of the company; but in the meantime he had issued, as register and transfer agent, an immense number of spurious shares, which he had transferred in a similar manner to other

parties, and these parties had obtained the transfer of these genuine shares into their own names on the books of the company, before any demand made by the plaintiffs, or any formal notice to the company of their holding such certificates with transfers signed in blank. The other facts in the case sufficiently appear in the opinion of the Court, which was delivered by

ELLSWORTH, J.—Several questions of the gravest character have been raised in this case, and have been argued with great learning and ability. Most of them we do not find it necessary to decide, as there is one which, in our opinion, is essentially decisive of the case. Thus, we need not determine whether, if the stock in question had been found to be spurious, there could be a recovery for the refusal of the defendants to allow a transfer of it, nor whether, if the transfer had been made, it would in that case have been of any benefit to the plaintiffs; nor need we determine whether the form of action adopted, is the proper one for trying the question of the liability of the defendants, for the frauds of their transfer agent in issuing fraudulent certificates of stock, nor whether such liability exists. We place our decision upon the ground that the defendants, upon whom the burden of proof upon this point clearly rests, do not show that the certificates held by the plaintiffs do not represent genuine stock, as, in the absence of proof to the contrary, they must certainly be taken as doing. The burden of proof upon this point, we say, is upon the defendants. Their agent, appointed for the express duty of issuing certificates to the holders of stock, issued these certificates in the usual form, and for the purposes prescribed by their rules, and it is to be presumed, certainly in favor of these plaintiffs, who had become *bona fide* holders of the certificates upon the credit which their official character gave them, that R. & G. L. Schuyler had, at the time, good stock to which they would apply, which presumption must stand until the defendants show, as they can do, if such was the fact, that there was no stock standing in their names which could be represented by the certificates. When we say that the defendants could show how the actual fact was, we mean merely that they had the power to show it, and do not intend to express an opinion upon the question, controverted in the case, whether

they would be allowed to show it, against the certificate of their own officer.

The defendants have not shown that, at the time when the plaintiffs took their certificates, there was not genuine stock held by the Schuylers sufficient to answer to them. On the contrary, it appears that at that time the Schuylers held one hundred and sixty shares of good stock, which stood in their names, and which they could have legally transferred to the plaintiffs or any other purchaser. If there were nothing more in the case, it would be clear that the defendants ought to have allowed the ninety shares, covered by the certificates held by the plaintiffs, to be transferred to them.

But here the defendants come in and show that, before the plaintiffs received their certificates, Robert Schuyler, their transfer agent, and one of the firm of R. & G. L. Schuyler; had issued to the firm, in his official capacity, certificates of stock to the amount of four hundred and ninety shares, beyond the one hundred and sixty shares of good stock held by the firm, and thus they say that the genuine stock had been all exhausted before the plaintiffs' certificates were issued. It is, however, not found, and the judge expressly states that it was his intention not to find, that these certificates for the four hundred and ninety shares had ever passed out of the hands of the Schuylers. It cannot be presumed, in the absence of all evidence on the subject, that those certificates had been transferred to other parties; much less can it be presumed that they had been so transferred upon a valuable consideration, and to *bona fide* holders. So far as we can see, therefore, and as upon the finding, we are to presume, the plaintiffs, when they received their certificates, were the first and only equitable purchasers and owners of ninety out of the one hundred and sixty shares, held by the Schuylers.

The fact, which is found, and which has been pressed upon us by the counsel for the defendants, as one of great importance, that the greater part of these certificates were afterwards, in the years 1849, 1850, and 1851, surrendered to the railroad company by the Schuylers, and cancelled, and new certificates issued in their place to other parties, can not, we think, affect the case. We regard the

right of the plaintiffs to the stock represented by their certificates, as one already vested, and which, under the by-laws of the company, which forbade the transfer of any stock except upon the surrender of the certificate representing it, could not be defeated so long as they held the certificates. The plaintiffs, relying upon the by-laws of the company, and the provisions of the certificates themselves, had retained and carefully preserved the certificates as the appropriate and conclusive evidence of their right to the stock. The defendants cannot set aside their own by-laws at their pleasure. The defendants, however, say, that the plaintiffs acquired only an equitable title to this stock, and that, though such a title will be recognised and protected within reasonable limits, yet, that a duty devolved upon the plaintiffs themselves in the matter, which they have neglected, and by which neglect they have lost their right to the stock. This duty, they say, was either to procure a transfer of the stock within a reasonable time, (which they say that four years clearly was not,) or else to give timely notice to the railroad company that the stock had been equitably assigned to them. They say that it is like the case of the grantee of real estate, who fails to get his deed recorded until after a *bona fide* purchaser has taken a later conveyance of the land, or of the vendee of personal property, who does not take a delivery of it, and loses his title to it as against a *bona fide* purchaser, who afterwards finds it in the possession of the vendor, and buys and takes a delivery of it. They say that, admitting the stock to be genuine, so that the equitable title acquired from the Schuylers was a good one, and entitled them to a transfer of ninety shares of genuine stock, if they had within a reasonable time demanded such transfer, or given notice of their equitable title, yet that the Schuylers retained the legal power to sell this same stock to other parties, who would acquire a legal and therefore a preferable title if they should first get a transfer of it, and that it was the duty of the defendants to allow a transfer of whatever good stock they found standing in the name of the Schuylers, upon the presentation and surrender of a certificate for the same, so long as they had no notice of any claim of other parties upon the stock; and that whatever claim the plaintiffs have for

damages upon any body, is not a claim upon them, but, as in the case supposed of the vendee, who had been defrauded by a later sale of the property by the vendor to another party, is a claim upon the Schuylers, their vendors, who have defrauded them; they, the defendants, being, as they say, merely custodians of the property, holding it subject to the order of the Schuylers, who were the owners of it, and having no other duty to perform than to see that the party calling for it had a proper order from the owners. We cannot assent to this claim of the defendants. We cannot regard them as mere custodians of the property, with no other duty with regard to it than that which has been suggested. By the very form of their certificates, specially prescribed, and specially adapted to the purpose of their negotiation, and which were issued by their own agent, and by their by-law, providing that no stock represented by such certificate should be transferred until the certificate itself was surrendered, they had assumed a duty far more extensive than that which they now assert. The *bona fide* holders of such certificates had a right to rely upon the certificate, under the circumstances, as securing to them the stock which they represented, *against all transfers to other parties*.

But there is a further, and we think decisive reason, why the defendants cannot avail themselves of this transfer of the stock to other parties. These very transfers to other parties were a fraud upon the plaintiffs. This fraud is wholly distinct from the fraud of their transfer agent in issuing spurious certificates. The agent who issued the certificates might be a different person entirely from the agent who superintended the transfers, and it will make the point clearer to suppose him to have been so. Now their transfer agent knew, when he allowed these transfers to other parties, that the stock had already been sold to a prior purchaser, who held a legal certificate for it, and that it was a fraud on that party to allow the stock to be transferred to other parties, so long as the certificate was not surrendered. Their transfer agent, in allowing these transfers, was *acting precisely within the scope of his official power, and his knowledge and fraud are, therefore, the knowledge and fraud of the defendants themselves*. We are supposing, in this view of the

case, that the very stock in question has been transferred to other parties. This is the claim of the defendants, and we therefore, for the sake of the argument, so regard the fact. If the same stock was in fact transferred to other parties, then their transfer agent knew that he was committing a fraud on the plaintiffs in allowing the transfer, for he knew that the certificate representing that stock had not been surrendered, but was still outstanding in the hands of a *bona fide* purchaser. If, however, this precise stock was not transferred to other parties, but those transfers are to be regarded as operating on other stock, or as having no operation at all, then this stock is still left untransferred, and the defendants are clearly liable for having refused to allow a transfer of it to the plaintiffs. We are by no means sure that this latter supposition may not be a correct one. The subsequent transfers do not purport to embrace these shares, while Schuyler was constantly creating new shares, (or what purported to be such), and transferring and re-transferring them, and issuing certificates for them, at his pleasure. These transfers and certificates may, perhaps, be regarded as having embraced only other stock, and as leaving the stock in question untransferred. We merely suggest this supposition, as it is not necessary to the general view of the case which we take.

But if the defendants are right in claiming that they are protected in transfers made to other parties, where they have no notice of equitable transfers to prior purchasers, yet this principle very clearly could not avail them here. The plaintiffs, it is said, should have given them notice of their equitable title. But how should they have given such notice? Why, only to that officer of the company whose duties related to the transfer of their stock; that is, to their transfer agent, Robert Schuyler, himself. But Robert Schuyler already had full knowledge of the fact, for he was the very party who sold the stock to the plaintiffs; and though a distinction may be made between the knowledge which he had as an individual, in which capacity he was acting in selling the stock, and the official knowledge which he would have acquired by a formal notice given to him as transfer agent of the company, yet, practically, this distinction is very unimportant. When afterwards he

came to allow the transfer of this stock to other parties, he was acting officially, and he then had knowledge, and acted with full knowledge, that the plaintiffs had acquired an equitable title to the stock. Notice of such an equitable title is never required to be formally given. Actual knowledge, however acquired, is enough to affect an individual, and we entertain no doubt that this knowledge of Robert Schuyler is to be regarded as the knowledge of their transfer agent, and as the knowledge of the defendants. It is to be observed, too, that Robert Schuyler was not merely the transfer agent of the defendants, but was, at the same time, the president of the company and one of its directors.

Two questions remain to be considered. One is, whether the plaintiffs have proved a sufficient demand upon the defendants for a transfer of the stock, to enable them to sustain their suit. That a demand was necessary is admitted by the plaintiffs. The first demand made by the plaintiffs' cashier, at the office of the company in New York, on the morning of July 5th, 1854, the day after the great fraud of Schuyler had been discovered, was not, in our opinion, sufficient. It appears that there was no transfer agent in the office, and that the company had appointed none in the place of Schuyler, who had just fled from the country, and the confusion incident to the developments then being made, fully justified the defendants in temporarily closing their transfer books, and in deferring the appointment of a new transfer agent. Such a course was necessary to the safety of the company, and was absolutely required by the condition of its affairs. As there was no absolute refusal to allow a transfer at some future time, we are inclined to the opinion that it was not such a refusal as to give the plaintiffs a right of action. The second demand, however, made by Mr. Buckingham in behalf of the plaintiffs, shortly before the commencement of the present suit, we think was sufficient. It was made at a proper time and in a proper form, and it is expressly found that Mr. Buckingham, in making it, was acting as the agent and attorney of the plaintiffs. It is said by the defendants that Mr. Buckingham could not make a legal demand, because he had entered into a champertous, and therefore illegal and void contract with the plaintiffs for the prose-

cution of this claim, and that this demand was made under that contract, as a part of the service which he was to render in the prosecution of the claim, and for the purpose of bringing the suit. But we regard the demand as unaffected by the illegality of the contract for the prosecution of the suit. It preceded the institution of the suit, and was not, properly, any part of it. He was none the less acting as the agent of the plaintiffs, and the plaintiffs have since ratified his act, if the authority given was defective before, by abandoning the champertous contract, assuming the benefit of the demand made by him, and proceeding with the suit on their own account. The question is purely one of authority, and we are satisfied that the authority was sufficient. It is a point of very little importance to these defendants, only at the most rendering another demand and suit necessary, and is too merely technical to deserve very much consideration. The defendants deny all right of the plaintiffs to a transfer of the stock, and upon any demand whatever, would have refused to allow the transfer, and we should not, except upon a positive necessity, send the plaintiffs out of court to make another useless demand.

The remaining question is, whether the blank power of attorney given by R. & G. L. Schuyler to the plaintiffs, under seal, at the time they took the certificates, was sufficient, and whether the plaintiffs could afterwards fill it up and use it as a valid power, taking effect at the time it bears date. We think that it was sufficient, and that they could fill it up and use it, although it was under seal. We are satisfied that it has been the practice of this railroad company from the first, as it is of many other corporations, to their own great convenience and that of the public, to allow blank powers of attorney to be filled up as circumstances should require; and such a practice may give a construction to, and may even qualify, and vary, a by-law of a corporation. But without going so far as this, we feel no hesitation in holding the power to be sufficient in blank, and we are satisfied that in this country the rule of law is, that a blank power of attorney, although under seal, may be filled up in conformity with the agreement of the parties, and when so filled up, takes effect as of its date. The

rule we suppose to be otherwise in England, where the old principle of the common law on the subject is more rigorously applied, and where the policy of the stamp system influences their decisions. The cases in this country in which the view taken by us is supported, are numerous, and may be found in Redfield on Railways, sec. 35; and Mr. Redfield, himself a jurist of much learning and of long experience on the bench, gives it as his opinion, that the doctrine of the American cases is decidedly preferable to that of the English. Nor can any reason be assigned, which is founded in good sense, and is not entirely technical, why a blank, in an instrument under seal, may not be filled up by the party receiving it after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinction between them. Such a technical distinction is little suited to the usages and necessities of modern commerce, for credit, among merchants, and facilities for making it available in their transactions, are a most important element in its character, however unimportant they may have been in a state of society where commerce was little known, where seals were a substitute for signatures, and where lords and vassals, alike, could not write their own names.

We do not find it necessary to go out of the record to learn what course this railroad company has always pursued with regard to the transfers of their stock, under powers of attorney. It is found that the certificates held by the plaintiffs are in the form prescribed by the by-laws of the company, and are such as the defendants have uniformly sanctioned and approved. These certificates, as they came from the defendants' hands, contained, on the same piece of paper, and immediately under the certificate, a blank assignment of the stock, and a blank power of attorney for its transfer. The defendants must therefore be held to have intended and agreed, that whoever should present the certificate so issued, with the assignment and power of attorney executed in blank, should be entitled to fill up the blanks with his own name,

and to have a transfer of the stock made to himself on the books of the company. The certificate, accompanied by the assignment and power of attorney thus executed, in blank, has perhaps a species of negotiability, although of a peculiar character, but one necessary to the public convenience, and to which it is no objection that the instrument has a seal.

But we feel relieved from embarrassment in holding this power sufficient, by the fact that the transfer was to be made under it in the State of New York, where, it is admitted by the defendants' counsel, the law is settled by the highest judicial authority in favor of the validity of a blank power of attorney. As the power was to be executed there, it is certainly sufficient that it was a valid one under the law prevailing there; and a citizen from Connecticut, who has taken his certificate here, has certainly the same rights under it in New York that a citizen of that State would have under a certificate taken there.

We will only remark, in conclusion, that the tendency of judicial decisions and of legislation in this country, is to do away, so far as can be done without too violent a departure from ancient rules, with distinctions in the character and effect of written instruments founded upon the mystical power of a seal. The legislature of this State has, repeatedly, by confirmatory acts, enacted that instruments purporting to be specialties, but from which the seal had been omitted, should be as good and valid as if sealed, and has further enacted that the letters *L. S.* or the letter *S.* or some equivalent, in the place where a seal is ordinarily affixed, shall be deemed to be a seal. Similar enactments we have no doubt are common in other States. In these circumstances we feel much more inclined to relax the strictness of the common law with regard to sealed instruments, than to adhere to it.

We have taken no notice of any security held by the plaintiffs, as affecting the amount of damages to be recovered, because no allusion was made to it in the argument. Independently of that, we advise the superior court to render judgment for the plaintiffs for the value of the stock in question at the time of the last demand, which is agreed to be sixty dollars per share, with interest from that date.